In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 175

MONTREAL SECURITIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is an action by the disappointed buyer of surplus government housing projects. Petitioner sought to rescind its contract with the Federal Housing Administration, the seller, and it mainded the return of the payments it had made toward the purchase price. When the FHA Commissioner refused, petitioner brought suit in the Court of Claims to recover its payments. That court granted summary judgment for the United States (Pet. App. 1a).

The facts are not in dispute and are fully set forth in the opinion below (Pet. App. 1a-4a). Briefly, the

FHA had insured the mortgages of two rental housing projects in Williston, North Dakota, under Title IX of the National Housing Act, 65 Stat. 295-302 (1951), as amended, 12 U.S.C. 1750 *et. seq.* Later, FHA became the owner of the properties through foreclosure. In April 1961, it issued a "Prospectus and Invitation to Bid" advertising the sale of the two projects. The information in this circular included a general description of the buildings, the minimum price the agency would accept, the maximum mortgage it would take and the required cash deposit with the bid. Also set forth were the rents fixed by the FHA and the percentage of occupancy of each of the projects for a preceding ten or twelve-month period, which averaged 80% or better. The following disclaimer was also a part of the prospectus:

> * * * Information provided herein is all that is to be made available by FHA. While care has been exercised to assure accuracy, all information herein is provided solely for permitting parties to determine whether or not the property is of such a type and general character as might interest them in purchase. Those interested are expected to acquaint themselves with the property and to arrive at their own conclusions as to physical condition, number and occupancy of revenue producing units, and any factors bearing upon valuation of the property.
>
> FHA MAKES NO WARRANTY AS TO THE ACCURACY OF ANY INFORMATION FURNISHED. [EMPHASIS IN ORIGINAL]

Petitioner's bid was accepted and on October 25, 1961, the sale was consummated. Shortly afterwards,

occupancy of the rental facilities declined to only 25% of capacity. A mortgage installment due February 1, 1962, was not paid and none of the succeeding installments was forthcoming. On May 20, 1962, plaintiff notified the FHA that it rescinded the transaction and that it wished the $20,275 which it had paid to be returned. The agency refused and plaintiff brought this suit. In the meanwhile, the FHA had reacquired the properties by foreclosure of the mortgages.

Petitioner did not contend that any of the material set out by the FHA in the "Prospectus and Invitation to Bid" was false. Rather, it asserted that implicit in the information there supplied was a material representation and warranty by FHA that the property being offered for sale was an "economically sound" investment, on which it relied. Alternatively, petitioner urged that, under a provision of Title II of the National Housing Act, 12 U.S.C. 1713(e)(3), the Federal Housing Administration was *required* to warrant the investment as "economically sound."

The Court of Claims correctly rejected both contentions. In light of the disclaimer already recited, far from making any representation as to the "economic soundness" of these projects, the Invitation to Bid required petitioner "to make and rely on its own judgments" in this respect. That is of course the usual rule applicable to government property sold "as is," particularly where the buyer is given the opportunity to inspect and investigate before bid. *Maguire & Co.* v. *United States*, 273 U.S. 67; *Mottram* v. *United States*, 271 U.S. 15; *Alloys and Chemicals*

Corporation v. *United States*, 324 F. 2d 509 (Ct. Cls.); *Dadourian Export Corporation* v. *United States*, 291 F.2d 178 (C.A. 2); *United States* v. *Hathaway*, 242 F.2d 897 (C.A. 9); *United States* v. *Silverton*, 200 F.2d 824 (C.A. 1); *American Elastics* v. *United States*, 187 F. 2d 109 (C.A. 2).* Indeed, it is the general rule in commercial transactions. 3 Corbin, *Contracts* (1960 ed.), § 605, pp. 638 *ff.*

The assertion that the National Housing Act required the Commissioner to warrant the "economic soundness" of these projects is likewise baseless. As the court below pointed out, the original mortgages on the projects in question were not insured under Title II of that Act, but rather under Title IX, which does not require a finding by the Commissioner that a rental housing project be economically sound before insuring any mortgage upon it. Under Title IX, such insurance could issue if the property represented "an acceptable risk in view of the needs of national defense," 65 Stat. 298, 12 U.S.C. 1750b(c), a much lesser standard, as the legislative history recited in the court's opinion makes plain (Pet. App. 6a). More-

* There is plainly no conflict, as petitioner suggests (Pet. 6), between the decision of the court below and either *United States* v. *Stage Company*, 199 U.S. 111, or *Kropp* v. *Federal Housing Administration*, 285 F. 2d 835 (C.A. 1); *Stage Company* did not involve an agreement for the purchase and sale of property. Rather, it dealt with a contract for the carriage of mail in which the parties' estimate of additional services to be rendered by the contractor free of charge was grossly wrong. In *Kropp*, the selling agency flatly misstated in its prospectus a positive known fact concerning what the court termed (285 F. 2d at 836) the "fundamental, basic description of the property."

over, the mortgage insurance criteria do not govern sales of foreclosed property. Under 12 U.S.C. 1713(l) and 1750c(f), the FHA Commissioner was given broad discretion with respect to the disposal of property, without any suggestion that he must warrant the soundness of the purchase he is inviting.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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